UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Curt Hébert, Jr., Chairman;
William L. Massey, and Linda Breathitt.

San Diego Gas & Electric Company,
Complainant,
v. Docket No. EL00-95-020

Sellers of Energy and Ancillary Services
Into Markets Operated by the California
Independent System Operator and the
California Power Exchange,
Respondents.

Investigation of Practices of the California ISO Docket No. EL00-98-019
and the California Power Exchange

Removing Obstacles to Increased Docket No. EL01-47-002
Generation and Natural Gas Supply in the
Western United States

Section 210(d) Proceeding Applicable to Docket No. EL01-72-000
Electric Utilities in California

ORDER GRANTING MOTIONS FOR EMERGENCY RELIEF IN PART
AND DEFERRING ACTION ON OTHER ASPECTS OF MOTIONS
AND PROPOSED ORDER UNDER SECTION 210(d)
DIRECTING INTERCONNECTIONS WITH QUALIFYING FACILITIES
AND ESTABLISHING FURTHER PROCEDURES

(Issued May 16, 2001)

In this order, we grant in part motions for emergency relief filed by Ridgewood Power LLC (Ridgewood) and the California Cogeneration Council (Cogeneration Council). Ridgewood and Cogeneration Council represent interests of qualifying facilities (QFs) in California. They allege that emergency action by this Commission is needed to assure that California QFs will be able to provide much needed capacity to the California market to help meet this year's summer peak demand for electric power in California. They say emergency action is needed because electric utilities in California have failed to pay California QFs for months of power deliveries, putting the California QFs into financial distress and jeopardizing the ability of the California QFs to continue production of power. They also say emergency action is needed because the electric utilities in California have failed to facilitate the sale of "excess QF power" [1] which was authorized in three prior Commission orders.

In this order we take action designed to assure that the maximum amount of QF power will be available to the California market this summer. We are:

> (1) Providing that any QF in the Western Systems Coordinating Council (WSCC), may sell "excess QF power" to third-party purchasers within the WSCC;
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> (2) Providing that any California QF may sell 100 percent of its output to third-party purchasers within the State of California, if a court of competent jurisdiction has concluded the QF may make such third-party sales;
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> (3) Finding that California utilities must provide interconnection to accomplish the-above QF sales to third-party purchasers pursuant to existing interconnection agreements with the California QFs;
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> (4) Finding that California utilities have the obligation pursuant to Order No. 888 to provide transmission service to accomplish the-above third-party sales; and
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> (5) Proposing to order California utilities to provide interconnections to California QFs under section 210(d) of the Federal Power Act (FPA).

Background

The Commission has taken numerous actions, in dozens of orders in recent months, to alleviate the severe electric energy shortages facing California and the West. Among those actions, the

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[1] For purposes of this order, "excess QF power" is power above what has been historically sold from a facility to the purchasing utility. A facility's seasonal average output during the two most recent years of operation will define historical output. See San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, 93 FERC ¶ 61,238 at 61,772 & n.3 (2000) (Order Granting Emergency Waiver of QF Regulations) (December 8 Order).

Commission has granted temporary waiver of the technical regulations relating to QF status.[2] This was intended to increase generation supply for the California markets by allowing California QFs to enter into bilateral contracts for the sale of excess QF power.[3] In the December 8 Order, the Commission noted that an additional 1,000 MW could be made available by this action. The Commission also noted that the generation supply shortage was affecting the price and reliability of power in California and noted that the increased supplies it expected from its actions could provide multiple benefits to California electricity consumers. In the March 14 Order, the Commission extended the waiver through December 31, 2001.[4] Today, in an order issued concurrently with this order, the Commission extends the waivers to April 30, 2002. See Further Order Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States, 95 FERC ¶ _,__ (2001).

Motions for Emergency Relief

On March 8, 2001, as updated on April 9, 2001, Ridgewood submitted a request for emergency relief in Docket Nos. EL00-95-020 and EL00-98-019. On April 9, 2001, Cogeneration Council filed a Motion for Emergency Relief in Docket No. EL01-47-000. In their motions for emergency relief, Ridgewood and the Cogeneration Council state that the previous waivers granted by the Commission have not increased supply by a single MW.[5] They allege that this is largely due to actions of the California utilities. They state that those utilities have: (1) refused to allow interconnections between the California QFs and the utilities to be used to effect sales to third parties; (2) refused to transmit QF power to third parties; and (3) threatened the California Independent System Operator Corporation (California ISO) with litigation if it transmits QF power to third parties. Ridgewood and the Cogeneration Council also allege that the California utilities have taken an additional action which has forced a number of California QFs offline (including Ridgewood), by withholding payment for power delivered by California QFs to the utilities.

Ridgewood and the Cogeneration Council have proposed remedies that they state will permit the QF capacity which has historically been sold to the California utilities to continue being sold, and

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[2]See December 8 Order at 61,773; San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, 93 FERC ¶ 61,294 at 62,018 (2000) (Order Directing Remedies for California Wholesale Electric Markets) (December 15 Order); Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States, 94 FERC ¶ 61,272 at 61,970-71 (2001) (March 14 Order).

[3]See note 1, supra.

[4]94 FERC at 61,970.

[5]These allegations are supported by others and are not denied by the California utilities.

also increase the generation supply for the California markets by enabling the sales of the excess QF power.

In particular, Ridgewood proposes the following remedies:

(1) an extension of the QF waivers to sell excess QF power through October 15, 2001;[6]

(2) a declaration that to the extent that any utility has failed to pay for power production, the QF is free to sell 100 percent of its output to a third party at negotiated rates;

(3) a clarification that any such sales shall mitigate the utilities' damages for contract breaches under the power purchase agreements (PPAs);

(4) a ruling that California utilities cannot deny transmission access to California QFs or refuse to schedule or deliver any generation sold by California QFs to third-party buyers;

(5) a statement that nothing in any Commission emergency order is intended to modify or terminate any existing PPAs between the California QFs and the California utilities; and

(6) a clarification that any sales pursuant to any QF waiver are strictly voluntary.

Cogeneration Council proposes the following remedies:

(1) an order granting relief under section 210 of the FPA by requiring interconnections and by requiring the California utilities to cease their denial of interconnection, transmission and related services to California QFs under existing agreements;

[6] We note that this request was made prior to the Commission's March 14 Order, which granted an extension through December 31, 2001. See 94 FERC at 61,970. Also, as described above, in an order issued concurrently with this order, we extend the waivers through April 30, 2002 and broaden them to apply to the entire WSCC.

(2) a declaration that the California utilities and the California ISO's refusal to transmit for California QFs constitutes an undue preference and discriminatory practice under section 205(b) of the FPA;

(3) a declaration that any order shall apply notwithstanding any contractual dispute between California QFs and the California utilities relating to QF PPAs or interconnection agreements; and

(4) a declaration that any Commission action does not constitute a contractual determination of the rights of any QF.

Notice and Responsive Pleadings

Notice of the Ridgewood and Cogeneration Council motions was published in the Federal Register, 66 Fed. Reg. 23,243 (2001) (May 2 notice), with comments, protests, and interventions due on or before May 10, 2001.

On April 24, 2001, the California Public Utilities Commission (California Commission) filed an answer to the Cogeneration Council motion. The California Commission argues that the Commission may not act under section 210 of the FPA without particularized notice and an opportunity for an evidentiary hearing. It also states that the California Commission is addressing the issues raised by the Ridgewood and Cogeneration Council motions and that the California Commission is the appropriate forum within which the California QF issues should be addressed. The California Commission notes that in response to the California Commission's March 27 order, which recalculated avoided cost rates for certain QF sales and required utilities to pay California QFs on a going forward basis, some QF capacity has come back on line.[7] The California Commission thus asserts that any argument that this Commission must act to assure that QF capacity will be available this summer is based on erroneous assumptions.[8] The California Commission further argues that this Commission is without jurisdiction to act on the motions, at least with regard to claims over contract disputes or that the California Commission has incorrectly set avoided costs.

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[7]Order Instituting Rulemaking on the Implementation of the Public Utilities Code Section 390, D.01-03-067 (March 27, 2001) (March 27 Order).

[8]Four entities have asked this Commission to take enforcement action against the California Commission concerning the California Commission's March 27 Order, and/or to issue a declaratory order stating that the California Commission's March 27 order violates PURPA. See Requests filed in Docket Nos. EL01-64-000 (by the Cogeneration Council), EL01-67-000 (by Tractebel Power, Inc.), EL01-71-000 (by Calpine Corporation) and EL01-77-000 (by Cogeneration Association of California) . We will act on these requests at a later date.

On March 23, 2001, Pacific Gas and Electric Company (PG&E) filed an answer to Ridgewood's motion. PG&E argues that the Commission should take no action which would increase the amount of uncontracted power in the California markets and should not interfere with the PPAs.

Southern California Edison Company (SoCal Edison) responded to both the Ridgewood (on March 23, 2001) and Cogeneration Council (on April 24, 2001) motions. On May 10, 2001, SoCal Edison filed an additional response to both petitions. SoCal Edison supports extension of the waiver of the QF standards, but opposes all other relief requested by the Ridgewood and Cogeneration Council. SoCal Edison claims that any of the other requested actions would interfere with existing contractual relationships. SoCal Edison states that it is attempting to enforce QF contractual obligations to sell power to it and has threatened California QFs with litigation if they sell to third parties. SoCal Edison agrees that it is true that it has asserted that California QFs may not sell to third-parties utilizing interconnection agreements that were entered into solely to permit sales from the California QFs to SoCal Edison pursuant to the mandatory purchase obligation under the Public Utility Regulatory Policies Act of 1978 (PURPA). SoCal Edison maintains that it has no authority to use existing interconnection arrangements so that California QFs can sell to third-parties "absent a FERC order."[9] SoCal Edison adds, however, that it has not been demonstrated that SoCal Edison has denied any open access services. Furthermore, in a letter from Stephen Frank, Chairman and Chief Executive Officer of SoCal Edison to Vice President Cheney, filed with the Commission on May 4, 2001, SoCal Edison asserts that while there have been assertions that 3,000 MW of QF generating capacity is off-line in California due to financial concerns, including nonpayment by SoCal Edison and Pacific Gas and Electric Company (PG&E) for past power deliveries, the facts are otherwise. SoCal Edison states that only 1,200 MW "of otherwise dependable QF resources contractually committed to SoCal Edison and PG&E are offline."[10] Of this 1,200 MW, SoCal Edison asserts only 720 MW are offline due to nonpayment. SoCal Edison claims that the California Commission's March 27 Order , revising the avoided cost price formula, "is directly responsible for most, if not all, of the QFs under contract to [SoCal Edison] being taken off-line."[11] SoCal Edison concludes that there should be no Federal action taken which would permit California QFs to abrogate their contracts in order to pursue greater profits in a dysfunctional spot market.

In its May 10, 2001 filing, SoCal Edison cautions the Commission that "further economic devastation would result from a Commission decision to 'liberate' QFs from their obligations to sell power at avoided cost rates under contracts with SCE." SoCal Edison May 10 Response at 1. SoCal Edison suggests that the California QFs are being untruthful in describing the economic harm they have suffered as a result of SoCal Edison's failure to pay the California QFs for the power they

[9] SoCal Edison response to Motion of Cogeneration Council at 2.

[10] May 4 letter at 1.

[11] May 4 letter at 2.

delivered to SoCal Edison for the months of November and December 2000, and January, February, March 2001. SoCal Edison argues that as a result of the California Commission's March 27 order, SoCal Edison is now paying the QFs, and that thus, "to the extent that QFs are arguing that they must be paid on a going-forward basis in order to remain online, the [California Commission] already has provided this relief." SoCal Edison May 10 Response at 8. SoCal Edison concludes that the California generation supply situation is not as drastic as portrayed by the QFs. It suggests that the QFs' estimates of the amount of QF generation that could be added to the grid as a result of the actions requested of this Commission is greatly exaggerated. All this, SoCal Edison argues, demonstrates that the Commission should not issue an order which would conflict with the contractual obligations of SoCal Edison and the California QFs.

On May 2, 2001, the Qualifying Facilities Lenders Council filed comments in support of the motion of the Cogeneration Council. It estimates that total non-payments of California utilities to California QFs are in excess of $1 billion.

On April 2, 2001, Sunray Energy, Inc. (Sunray) filed comments stating that it is an operator of two solar QF facilities (total of 44 MW) in the Mojave Desert. It explains that there are seven other solar facilities in the Mojave Desert that total 354 MW of capacity. It states that it and other solar facilities have been unable to utilize the waiver previously granted by the Commission, because the California ISO and the California Department of Water Resources would not enter into contracts for the sale of excess power without either a court order or a letter from SoCal Edison stating that SoCal Edison agreed to the sale.

The Cogeneration Association of California (Cogeneration Association) filed comments in support of the motions for emergency relief. The Cogeneration Association suggests that the Commission clarify that: (1) any QF that has not been paid for power delivered to a California utility be permitted to sell up to 100 percent of its power output to any third-party buyer within California at negotiated rates; (2) any revenues received from third-party sales do not relieve the utilities from past or future obligations; (3) California utilities cannot deny transmission access or otherwise frustrate, condition or refuse to schedule or deliver any generation sold by California QFs to third-party buyers; and (4) nothing in the emergency relief order is intended to modify or terminate existing contracts.

The Electric Power Supply Association (EPSA), and Dynamis Incorporated (Dynamis), filed comments requesting that the Commission: (1) clarify that to the extent any California utility has failed to pay in full for power provided, the QF may sell up to 100 percent of its power output to third parties at negotiated rates; (2) clarify that any revenue received from third-party sales will not relieve the utilities from their past or future financial obligations under their PPAs, but will mitigate the utilities' liabilities during the period that such sales occur; (3) clarify that California utilities cannot deny transmission access or refuse to provide other services related to the sale by California QFs to third parties; (4) clarify that the Commission's authorization of third-party sales is not intended to modify or terminate existing PPAs, and that utilities may not block QF sales to third-parties by asserting PPA rights or defenses; and (5) affirm that any sales pursuant to the QF waiver are voluntary.

Calpine Corporation (Calpine), Independent Energy Producers Association (IEP), and EPSA request that the Commission expressly permit California QFs to use existing interconnection arrangements to deliver excess QF power to the grid. In particular, IEP recommends that the Commission: (1) penalize utilities if they assert contract breaches by QFs who rely on the Commission's waivers; (2) direct the California ISO to provide a seamless interconnection process for existing facilities; and (3) allow California QFs to change scheduling coordinators seamlessly after suspending or exiting a contract.

The California ISO filed comments stating that to the extent that QFs in California are released from their existing PPAs and wish to sell their output into the California ISO's markets, the Commission should clarify that the facilities' existing Interconnection Agreements should continued to be honored.

On May 7, 2001, the Cogeneration Council filed a response to the comments of SoCal Edison and the California Commission. In it, the Cogeneration Council urges the Commission to act as soon as possible and to make its order effective immediately in order to restore generation to California. Cogeneration Council alleges that SoCal Edison's claim, that it is now paying California QFs for power delivered since the March 27 Order, is false or misleading.

Pleadings in Response to the May 2, 2001 Secretary's Notice

In response to the May 2 notice, the following entities filed timely motions to intervene without taking a position on the requests for emergency relief: the California ISO; Modesto Irrigation District; Mirant Americas Energy Marketing, LP, Mirant California, LLC Mirant Delta, LLC and Mirant Potrero, LLC, collectively; the Cities of Redding, Santa Clara and Palo Alto, California and the M-S-R Public Power Agency, collectively; Duke Energy North America, LLC and Duke Energy Trading and Marketing, LLC, collectively (Duke Energy); the Transmission Agency of Northern California (TANC); and the Metropolitan Water District of Southern California (Metropolitan). In their intervention requests, Duke Energy, TANC and Metropolitan seek clarification of the scope of the proceeding initiated under section 210(d) of the FPA that is the subject of Docket No. EL01-72-000.

In response to the May 2 notice, the following entities filed motions to intervene and/or comments in support of the requests for emergency relief:[12] the California Cogeneration Council; EPSA; Calpine Corporation; Ridgewood Power LLC; Watson Cogeneration Company; Caithness

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[12] In some cases (e.g., Ridgewood) the comments filed in response to the May 2 notice amend or supplement comments that had been filed earlier in these proceedings.

Energy, LLC; Dynamis, Inc.; Automated Power Exchange, Inc. (Automated); Berry Petroleum Company (Berry);[13] CE Generation, L.L.C.; Tractebel Power, Inc.; EF Oxnard, Inc.; and Sunray. A number of these entities are, or represent, California QFs that claim they have not been paid by their utility purchasers in many months and are facing dire financial distress, including possible bankruptcy. Several of these entities also attest to specific instances where they have been denied access to interconnection and transmission service by either SoCal Edison or PG&E in their efforts to sell power to third party purchasers. Many of these entities strongly endorse the requests for emergency relief, and conclude that by granting the requests for emergency relief the Commission will help to add significant amounts of generation to the California energy market.

In response to the May 2 notice, the following entities filed motions to intervene and/or comments opposing the requests for emergency relief and the Commission's decision to initiate a proceeding under section 210(d) of the FPA: SoCal Edison; PG&E; San Diego Gas & Electric Company (SDG&E); and the California Electricity Oversight Board.

SoCal Edison's comments in opposition to the requests for emergency relief have been summarized above.

In its comments, SDG&E urges the Commission to dismiss the requests for emergency relief and to defer to the California Commission's on-going investigation of QF operations in California that will address QF availability, pricing and payment issues. SDG&E claims that such deference to the California Commission would be consistent with PURPA and the Commission's regulations to leave PURPA implementation to the states. SDG&E also notes that there are settlement and legislative initiatives underway that would be more appropriate fora to address the concerns raised by the QF movants. Moreover, SDG&E states that because it is current in its payments to QF suppliers, any relief granted to allow third party sales by QFs should not apply to SDG&E's QFs. SDG&E also argues that because the California QF contracts have been heavily front-loaded with financial benefits for the QFs, it would be unduly discriminatory to selectively revise only one aspect of these contracts (as proposed by the QF movants). Finally, SDG&E claims that allowing the California QFs to sell to third party purchasers would adversely affect the cost and reliability of electricity in California.

PG&E opposes the requests for emergency relief and the initiation of the proceeding under section 210(d) for several reasons. First, PG&E claims that QF generation availability is no longer an issue in California and that the vast majority of California QFs are currently producing power and getting fully paid for it. For example, PG&E claims that only 109 MW of QF generating capacity under contract to it remains off-line due to financial reasons. Thus, PG&E contends that the allegations made by the QF movants are outdated and there are no unresolved issues that would require a section

[13]The Automated and Berry motions to intervene were filed one day out-of-time, on May 11, 2001.

210(d) proceeding. Second, PG&E argues that while the provision of interconnection and transmission services to QFs by utilities would not increase generation supply in California, it would significantly increase costs to California ratepayers. Like SDG&E, PG&E argues that the California Commission's on-going proceeding on QF operations is the appropriate forum to address the concerns raised by the QF movants. Third, PG&E argues that the QF movants' requested relief could only be granted by a Commission ruling to invalidate the QFs' PPAs with the utility purchasers. PG&E claims that the Commission lacks jurisdiction to abrogate these contracts, and that even if it did have jurisdiction, the Commission should not elect to do so for policy reasons. Finally, if the Commission grants the QF movants' requested relief, then PG&E argues that the Commission should either (a) require any of PG&E's QFs making third party sales to credit PG&E the difference between the QFs' market revenues and costs, or (b) terminate the PPAs and order the QFs to pay liquidated damages to PG&E.

Finally, the Oversight Board opposes the QF movants' requested relief for primarily the same reasons provided by SoCal Edison, PG&E and SDG&E (e.g., there is little QF power that is currently off-line, QFs are getting fully paid on a going-forward basis, the Commission lacks jurisdiction to abrogate the QFs' PPAs with the utility purchasers, and the Commission should defer to the California Commission on the QF movants' requested relief). The Oversight Board stresses that allowing QFs to sell all of their output in the open market will greatly exacerbate market volatility in California, increasing the need to rely on short-term spot market purchases. The Oversight Board claims that this, in turn, will likely double the cost of electricity in California. In summary, the Oversight Board urges the Commission to terminate the proceeding initiated under section 210(d) of the FPA, but if it elects not to, then at a minimum it should conduct an evidentiary hearing to permit discovery and develop a thorough record to evaluate the issues under investigation.

On May 16, 2001, the Cogeneration Council filed a supplement to its petition for enforcement in Docket No. EL01-64-000 in which it answers SoCal Edison's May 10, 2001 pleading. The Cogeneration Council states that "[m]any more QFs remain offline entirely than the utilities admit." The Cogeneration Council attaches affidavits from its members indicating the current operating situation of their facilities. In the affidavits members of the Cogeneration Council allege that the California Commission's March 27 order, following months of nonpayment by the utilities, provides insufficient financial incentives to bring the QFs back to full production.

Discussion

Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2000), the timely, unopposed motions to intervene serve to make those who filed them parties to the proceeding or proceedings in which they intervened.

The Emergency Motions

We will grant in part, and deny in part, the relief requested in the Ridgewood and Cogeneration Council emergency motions. First, we defer action on the issue of whether, for any QF that has not been fully paid by a California utility for past deliveries of power, we should allow that QF to sell 100 percent of its power to third parties at negotiated rates under bilateral arrangements. We will address this issue in a future order to the extent that these matters are not otherwise resolved in other fora. Second, we find that QFs may sell "excess QF power" to purchasers within theWSCC. Third, we find that when California QFs sell "excess QF power" or when California QFs make sales to third-parties as authorized by a court of competent jurisdiction, the California QFs are permitted to request, under existing agreements and tariffs, and the California utilities must provide, interconnection service and transmission service to effect sales to third-party purchasers. [14] Finally, we invoke our authority under section 210(d) of the FPA to issue a proposed order to require all utilities interconnected with California QFs that sell "excess QF power" or California QFs that are authorized by a court of competent jurisdiction to make sales to third-parties to provide interconnection and related services to such California QFs in order to permit the California QFs to make these third-party sales. We are taking this action to enable California QFs to sell the maximum amount of power they are capable of producing to help address the critical need for power in California. We will allow this authority to remain in place until April 30, 2002, the end date for the QF waivers extended in an order issued concurrently with this order.

Nonpayment by SoCal Edison and PG&E

SoCal Edison and PG&E have not paid QFs in full for power delivered in November and December of 2000, and January, February, and March of 2001. As for April of 2001, SoCal Edison and PG&E claim to have made payments to California QFs on a going forward basis (after issuance of the California Commission's March 27 Order). Nevertheless, the ISO, in a press release dated April 25, 2001, attributed a stage two electrical emergency to a number of factors, including that "[a]n additional 3,000 [MW] of generation from [California QFs is] unavailable due to continuing financial concerns."[15] The California Commission asserts that this Commission should leave the solution of the non-payment issues to it.

[14] Sales of QF power made pursuant to this order may be made either pursuant to bilateral contracts at negotiated rates, or into the Cal ISO's real-time market. QFs that choose the real-time market will be required to be price takers and accept the market clearing price.

[15] SoCal Edison disputes that all of the 3,000 MW are unavailable due to financial concerns, but, as noted above, admits that 720 MW of QF power is unavailable because of financial concerns, caused, at least in part, by the failure of the California QFs to be paid by SoCal Edison and PG&E for power they produced and sold to those utilities. May 4 letter at 1. In a May 9, 2001 press release the ISO estimated that the amount of QF generation that was unavailable was 1,400 MW.

We conclude that if courts of competent jurisdiction authorize California QFs to enter into third-party contracts to sell power that historically was made to the non-paying utility purchasers pursuant to PURPA, the California utilities shall provide for interconnection service under their existing interconnection agreements.[16] In addition, California QFs that have the right to sell power to third-party purchasers also have the right to request transmission service, and public utilities have the obligation to provide it, pursuant to Order No. 888.[17]

We emphasize that the action we are taking herein does not modify or abrogate existing contracts. Whether or not the contract between a QF and its utility-purchaser has been breached by either the QF or the purchasing utility, as well as what the appropriate remedies may be, and whether any sales to third-party purchasers serve to mitigate damages, are all issues for a state court to resolve.[18] We also wish to emphasize that the actions we take today do not affect the QF status of any facility which makes third-party sales in any way.

Excess QF Power

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[16]SoCal Edison suggests that all that is required for it to provide service under existing interconnection agreements is "a FERC order." April 24 SoCal Edison response to Cogeneration Council motion at 3. As discussed below, we are also ordering interconnection under section 210(d) of the FPA to assure that there is no question about the utilities' obligations to provide necessary interconnection service.

[17]See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles January 1991-June 1996 ¶ 31,036 at 31,688 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in part and rev'd in part sub nom. Transmission Access Policy Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000), cert. granted in part and denied in part, 69 U.S.L.W. 3574 (U.S. Feb. 26, 2001).

[18]Also, on April 16, 2001, PG&E filed for Chapter 11 bankruptcy protection. The Bankruptcy Code provision automatically staying certain actions against the debtor allows an exception for action by a governmental unit to enforce its police and regulatory power. 11 U.S.C. § 362(b)(4) (1994 & Supp. 2000). In this case, we are exercising our regulatory power under the FPA and PURPA. This order does not excuse QFs under contract to PG&E from any obligation they may have to obtain permission from the bankruptcy court. For both of these reasons, the order does not threaten the bankruptcy court's control over the property of the bankruptcy estate and falls within § 362(b)(4) of the Bankruptcy Code.

In our prior orders granting waivers to permit sales of excess QF power, we defined what we meant by "excess QF power" and expressed our expectation that sales of excess QF power would take place. Our expectation, however, has not come to fruition. A number of reasons for the failure of sales of excess power to take place have been offered, including: (1) the threat by utilities of litigation against potential purchasers or transmitters of the excess QF power; (2) inadequate compensation under California Commission avoided cost orders to induce such sales; and (3) the refusal of the utilities interconnected with the California QFs to allow existing interconnection agreements to be used to accomplish such sales.

As we noted above, we estimated an excess QF capacity of over 1000 MW. Whatever the reason, sales of excess QF power simply have not materialized. Thus, we believe that we must take action to enable QFs in California to make third-party sales of excess power at negotiated rates. In this regard, we note that pursuant to the waiver orders, sales of excess QF power may take place outside the context of the pricing provisions of existing QF contracts and may be at negotiated rates, provided that the power is sold in California. Moreover, if a QF enters into a third-party contract to make sales of excess QF power, the California utilities must provide interconnection service under their existing interconnection agreements.[19] Finally, we emphasize that a QF that sells excess power to third-party purchasers has the right to request transmission service, and the appropriate public utilities have the obligation to provide it, pursuant to Order No. 888.[20]

Section 210 (d) of the Federal Power Act

It has been argued that the existing interconnection agreements are insufficient to provide interconnection service to California QFs to accomplish sales of power to third-party purchasers.[21] As we discussed above, we believe that the existing interconnection agreements permit the provision of such service. However, to avoid any uncertainty and to assure that interconnection services are provided, we are proposing to order under section 210(d) of the FPA electric utilities in California to provide immediately interconnection service to permit sales of excess QF power to third-party purchasers or sales of QF power that are authorized by a court of competent jurisdiciton.

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[19] SoCal Edison suggests that all that is required for it to provide service under existing interconnection agreements is "a FERC order." April 24 SoCal Edison response to Cogeneration Council motion at 3. As discussed below, we are also instituting a proceeding under section 210(d) of the FPA and ordering interconnection to assure that there is no question about Commission authority in this area.

[20] Order No. 888 at 31,688.

[21] SoCal Edison, however, has suggested that all that is required is a Commission order permitting that the use of existing interconnection agreements.

Relevant Statutory Provisions

Section 210(d) of the FPA provides that the Commission may on its own motion, after compliance with the requirements of paragraphs (1) and (2) of subsection (b), issue an order requiring any action described in subsection (a)(1) if the Commission determines that such order meets the requirements of subsection (c).

Section 210(a)(1) of the FPA provides, in relevant part, that upon application of a QF:

> [T]he Commission may issue an order requiring --
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> > (A) the physical connection of any cogeneration facility, any small power production facility, or the transmission facilities of any electric utility, with the facilities of such applicant.
> >
> > (B) such action as may be necessary to make effective any physical connection described in subparagraph (A), which physical connection is ineffective for any reason . . . .
> >
> > (C) such sale or exchange of electric energy or other coordination, as may be necessary to carry out the purposes of any order under subparagraph (A) or (B), or
> >
> > (D) such increase in transmission capacity as may be necessary to carry out the purposes of any order under subparagraph (A) or (B).

Section 210(c), however, limits the Commission's ability to order interconnection, providing that:

> No order may be issued by the Commission under subsection (a) unless the Commission determines that such order --
>
> > (1) is in the public interest,
> >
> > (2) would --
> >
> > > (A) encourage overall conservation of energy or capital,

> (B) optimize the efficiency of use of facilities and resources, or
>
> (C) improve the reliability of any electric utility system or Federal power marketing agency to which the order applies, and
>
> (3) meets the requirements of section 212.

Section 212(c)(1) provides that, before issuing a final order under section 210, the Commission shall issue a proposed order setting a reasonable time for the parties to agree to terms and conditions for carrying out the order, including the apportionment of and compensation for costs.

As an initial matter, we find that the requirements of section 210 (b)(1) and (b)(2) have been met. Notice has been issued to each affected State regulatory authority,[22] and each affected electric utility. An opportunity for a hearing will be afforded for those intervenors presenting issues of material fact that cannot be resolved on the basis of the written record.

Interconnection under section 210

For the reasons set forth below, we find that an order requiring the provision of interconnection satisfies the requirements of section 210 of the FPA.

The Commission may issue a proposed order directing an interconnection under section 210 if it finds that the interconnection is in the public interest and either (1) encourages conservation of energy or capital, (2) optimizes the efficient use of facilities and resources, or (3) improves the reliability of any electric utility system to which the order applies, and meets the requirements of section 212. Section 212 requires that the Commission follow a two-step process under which it issues a proposed order and gives the parties a reasonable time to agree on terms and rates.

In applying the public interest standard with respect to applications for interconnection under section 210, the Commission has found that interconnections serve the public interest so long as the interconnecting utility is fully and fairly compensated and there is no unreasonable impairment of

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[22]The notice which was published in the Federal Register, 66 Fed. Reg. 23,243 (2001) was also sent directly to the California Commission and to each California utility. Moreover, by its very terms, this proposed order provides the required statutory notice.

reliability.[23] The interconnections at issue here will be used for the same purposes as they are currently used, i.e., to deliver the same QF power to the grid.

We also find that the order will optimize the use of the already built generation facilities, and will improve the reliability of the electric utility systems to which they apply by supplying power that would otherwise be withheld from those systems.

Because we find that interconnection of California QFs with electric utilities in California meets the requirements of section 210, we are issuing a proposed order directing electric utilities in California to immediately interconnect with California QFs that are authorized to make third-party sales.

Further Procedures

As noted above, section 212(c)(1) provides that, before issuing a final order under section 210, the Commission shall issue a proposed order setting a reasonable time for the parties to agree to terms and conditions for carrying out the order, including the apportionment of and compensation for costs. If the parties to the proposed interconnection order are able to agree, the Commission will issue an order reflecting the agreed-upon terms and conditions if the Commission approves of them. If the parties to the proposed interconnection order are unable to agree within the allotted time, the Commission will prescribe the apportionment of costs, compensation, terms, and conditions of interconnection.

Accordingly, we will give the California utilities and QFs five days from the date of issuance of this proposed order to negotiate the rates, terms and conditions of the interconnections ordered herein, consistent with section 212 of the FPA.[24] We will also require that, on the 5th day after the issuance of this order, the California QFs are to make a final offer as to the proposed interconnection agreement reflecting all issues upon which the parties have agreed and giving the rationale for its final position on the

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[23]See Illinois Municipal Electric Agency v. Illinois Power Co., 86 FERC ¶ 61,045 at 61,176 (1999) (IMEA). In Florida Municipal Power Agency v. Florida Power & Light Company, 65 FERC ¶ 61,125 at 61,615, reh'g dismissed, 65 FERC ¶ 61,372 (1993), final order, 67 FERC ¶ 61,167 (1994), reh'g denied, 74 FERC ¶ 61,006 (1996), the Commission determined in a comparable context involving a section 211 application that the availability of transmission service, as a general matter, enhances competition in power markets by increasing power supply options of buyers and power sales options of sellers and leads to lower costs to consumers. In IMEA, the Commission found that the application of the public interest standard under section 211 is equally appropriate for section 210 proceedings.

[24]The existing interconnection agreements should provide a base reference point in these negotiations and we expect that the apportionment and compensation for costs reflected in the existing interconnection agreements will be reflected in the agreements ordered herein and absent an agreement by the parties will be used to establish interim rates.

issues which the parties have not agreed. On the 7th day after issuance of this order, the utilities will give the California QFs a preliminary brief setting forth their arguments. The California QFs will provide their responses to the utilities on the 10th day. On the 13th day, if there are matters still in dispute, the parties will file final briefs with the Commission. Final briefs are to use as a starting point the California QFs' final offer and are to be organized issue by issue in the same order as the preliminary brief provided by the California QFs to the utilities. They must be accompanied by any necessary supporting data. We direct the parties to provide cost support information in sufficient detail to enable the Commission to establish final rates pursuant to section 212 or, at a minimum, to establish interim rates pending a final decision.

Pursuant to section 212(c)(1) of the FPA, this proposed interconnection order shall not be reviewable in any court, since all determinations made in this order are preliminary. In addition, consistent with 18 C.F.R. § 385.713 (2000), this interconnection order is an interlocutory order not subject to requests for rehearing. The proper time for parties to seek rehearing is after the Commission issues a final order.

The Commission orders:

(A) Ridgewood's motion for emergency relief is granted in part, as discussed in the body of this order, effective on the date of this order.

(B) Cogeneration Council's motion for emergency relief is granted in part, as discussed in the body of this order, effective on the date of this order.

(C) All California electric utilities are hereby ordered to interconnect with any authorized California QF requesting such interconnection for purposes of accomplishing third-party sales, pursuant to section 210 of the FPA, as discussed in the body of this order.

(D) All California electric utilities, including SoCal Edison, PG&E and SDG&E, and any authorized California QF requesting interconnection for purposes of accomplishing third-party sales are hereby directed to undertake the procedures to implement Ordering Paragraph (C) above, as discussed in the body of this order.

By the Commission.

(S E A L)

David P. Boergers,
Secretary.